LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 19 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 740

BRENDA K. MONROE, *et al.*,

Petitioners,

—v.—

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL J. HENRY
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

J. EMMETT BALLARD
116 W. Lafayette St.
Jackson, Tennessee

Attorneys for Petitioners

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
The Jackson City School System and General Policies Perpetuating Segregation	5
The Racial Basis of the Board's Junior High School Attendance Policies and the Educational Expert Panel's Proposed Non-Racial Plan	8
The Expert Panel's Analysis of Why the City of Jackson's Schools Will Remain Segregated Unless its Policies are Changed to Disestablish Segregration	13
REASONS FOR GRANTING THE WRIT—	
I. Introduction—The Importance of the Case	15
II. The Sixth Circuit Applied an Erroneous Standard in Deciding this Case, Which is Inconsistent with Decisions of this Court	19
III. The Sixth Circuit's Decision Conflicts with Recent Major Decision of the Fifth, Eighth, and Tenth Circuits on the Question of Whether a Previously Segregated School System Must Undertake Affirmative Action to Disestablish Segregation	24
CONCLUSION	32

APPENDIX PAGE

Memorandum Opinion of the United States District Court for the Western District of Tennessee (filed July 30, 1965) 1b

Order of the United States District Court for the Western District of Tennessee (filed August 11, 1965) 26b

Opinion of the United States Court of Appeals for the Sixth Circuit (filed July 21, 1967) 33b

Order of the United States Court of Appeals for the Sixth Circuit (filed July 21, 1967) 46b

TABLE OF CASES

Bell v. School City of Gary, Ind., 324 F.2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924 ..... 25, 26

Board of Education of Oklahoma City Public Schools v. Dowell, 375 F.2d 158, cert. den. 387 U.S. 931 ..... 28, 29, 30, 31

Bradley v. School Board of the City of Richmond, 382 U.S. 103 (1965) 4

Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955) 4, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26

Cooper v. Aaron, 358 U.S. 1 (1958) 22, 23

Charles C. Green v. County School Board of New Kent Co., Va., Supreme Court No. 695, October Term 1967 15

Goss v. Board of Education of City of Knoxville, Tenn., 373 U.S. 683 (1963) 7, 21

PAGE

Kelley v. Altheimer, Arkansas Public School District No. 22, 378 F.2d 483 (8th Cir. 1967) 27, 28
Kelley v. Board of Education of City of Nashville, Tenn., 270 F.2d 209 (6th Cir. 1959), cert. den. 361 U.S. 924 ..... 20, 21

Louisiana v. United States, 380 U.S. 145 (1965) 23

Mapp v. Board of Education of City of Chattanooga, Tenn., 373 F.2d 75 (1967) 21

Plessy v. Ferguson, 163 U.S. 537 (1896) 20

Raney v. The Board of Education of the Gould School District (8th Cir., No. 18,527, August 9, 1967) 28
Reynolds v. Sims, 377 U.S. 533 (1964) 24
Rogers v. Paul, 382 U.S. 198 (1965) 4, 23

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 23

United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1943) 23
United States v. Jefferson County Board of Education, et al., 372 F.2d 836 (5th Cir. 1966), re-affirmed *en banc*, 380 F.2d 385 (5th Cir. 1967) 5, 16, 24, 25, 26, 27
United States v. National Lead Co., 332 U.S. 319 (1947) 23
United States v. Standard Oil Co., 221 U.S. 1 (1910) 23

STATUTE

42 U.S.C. § 1983 2

PAGE

OTHER AUTHORITIES

Southern School Desegregation, 1966-67, a Report of the U.S. Commission on Civil Rights, July, 1967 16

Desegregation Report, Fall 1966, of Tennessee's Public Elementary and Secondary Schools, a Report of the State of Tennessee, Department of Education, Equal Educational Opportunities Program 16, 17

IN THE

Supreme Court of the United States

October Term, 1967

No. .....

BRENDA K. MONROE, *et al.*,

Petitioners,

—v.—

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on July 21, 1967.

Citations to Opinions Below

The district court's opinion is reported at 244 F. Supp. 353, and is reprinted in the Appendix hereto, *infra*, pp. 1b-32b. The opinion of the Court of Appeals is unreported and is printed in the Appendix hereto, *infra*, pp. 33b-46b. An earlier district court opinion in this case is reported at 221 F. Supp. 968.

Jurisdiction

The judgment of the Court of Appeals was entered July 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether the courts below should have required the school board to adopt a desegregation plan which would abolish the dual school system and eliminate the identifiable Negro school.

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. Section 1983 providing a right of relief in equity for violations of constitutional rights.

Statement[1]

This class action was filed January 8, 1963 by Negro students against the Board of Commissioners of the City of Jackson, Tennessee, which administers the city school system. The original complaint, asserting rights secured by the Fourteenth Amendment, sought injunctive relief against the continued operation of a compulsory segregated school system, and an order requiring the city to

---

[1] The page citations in this Statement are to the original page numbers in Volumes I-IV of the typed transcript of testimony at the district court hearings of May 28 and June 18, 1965, which have been filed as part of the certified original record by the Clerk of the Court of Appeals for the Sixth Circuit.

present a plan for reorganization into a unitary nonracial system. In due course, the Board of Commissioners came forward with a proposed plan of gradual desegregation which was modified as to timetable and approved by the district court. See 221 F. Supp. 968 (W.D. Tenn., 1963).

After the elementary school desegregation plan had operated for two years, and proposed desegregated junior high school zones had been announced, plaintiffs filed a Motion for Further Relief (9/4/64), Specification of Objections to Junior High School Zones (11/30/64), and an Additional Motion for Further Relief (4/19/65), alleging generally that the Board's zoning, transfer, and faculty assignment policies were designed to perpetuate segregation to the maximum extent possible. The district court held hearing on these motions and objections on May 28, 1965 and June 18, 1965. The Superintendent of Schools testified and plaintiffs presented expert testimony of three educational administrators, Dr. Roger W. Bardwell, Superintendent of Schools of Elk Grove Township, Illinois; Merle G. Herman, Assistant Superintendent of Schools of Villa Park, Illinois; and Dr. Eugene Weinstein, Professor of Sociology, Vanderbilt University, Nashville, Tennessee.[2]

---

[2] Dr. Bardwell's qualifications included B.S., M.S., and Ph.D. degrees from the University of Wisconsin in public school administration, fifteen years' experience in school administration generally, and substantial experience in school building planning and zoning. The Elk Grove school district of which he had been superintendent for five years was of approximately the same size as the Jackson city school system (T. 136-138). Mr. Herman's educational qualifications included a B.A. from McKendree College, and an M.A. and completion of most doctoral requirements at Washington University in St. Louis. His experience included three years' public school teaching, seven years' public school administration, and ten years college teaching in the field of education. During the period in which he was a university faculty member, he participated in many school surveys in a number of different states, including zoning problems as part of those surveys. The school system of which he was Assistant Super-

The district court decided that racial gerrymandering was so obvious in the case of some elementary zones that it was required to order some alterations. However, the court ruled that gerrymandering was not obvious enough to allow relief in the case of junior high school zones, in spite of substantial expert testimony to the contrary. The experts had concluded that a school system which intended to desegregate rather than preserve the maximum amount of segregation, would, in accord with standard educational practice, have adopted an entirely different zoning system for junior high schools. The district court, in addition to holding that the Board of Commissioners had no affirmative obligation to re-organize its school system to disestablish segregation of students, held that the board had no obligation to re-assign faculty members to eliminate faculty segregation. See 244 F. Supp. 353 (W.D. Tenn. 1965), Appendix *infra*, pp. 1b-25b.

On appeal the United States Court of Appeals for the Sixth Circuit held that while the district court had erred with regard to faculty segregation, citing *Bradley* v. *School Board of the City of Richmond, Va.*, 382 U.S. 103 (1965), and *Rogers* v. *Paul*, 382 U.S. 198 (1965), it had not erred with regard to students. The Sixth Circuit reaffirmed its traditional view of the nature of the constitutional obligation of desegregation that "we read *Brown* as prohibiting only enforced segregation", and expressly disagreed with and declined to follow the contrary view

---

intendent was also of approximately the same size as the Jackon city school system (T. 196-197). Dr. Weinstein's qualifications included a B.A. from the University of Chicago, an M.A. from Indiana University, and a Ph.D. from Northwestern University, all in the areas of sociology and social psychology. His particular field of specialization was child development, and he had conducted studies of the impact of school desegregation on the development and educational attitudes of children and their parents (T. 299-301).

adopted by the United States Court of Appeals for the Fifth Circuit in *United States et al.* v. *Jefferson County Board of Education et al.*, 372 F.2d 836 (5th Cir., 1966), re-affirmed *en banc*, 380 F.2d 385 (5th Cir., 1967). See Appendix, *infra*, pp. 33b-45b. Plaintiffs seek to have reviewed on certiorari the specific ruling on gerrymandering of junior high school zones in the Jackson city school system, which was based on the general legal premise of lack of an affirmative obligation to disestablish segregation of students.

The Jackson City School System and General Policies Perpetuating Segregation

Jackson, Tennessee is a small to medium sized city in mid-western Tennessee, with a school system of approximately 8,000 students, about 40% Negro and 60% white. The system has eight elementary schools, three junior high schools, and two high schools (Pl. Ex. 26). Up until the school year 1961-62, eight of the thirteen schools (5 elementary, 2 junior high, and 1 high school) were exclusively for whites, and the remaining five (3 elementary, 1 junior high, and 1 high school) were designated for Negroes ((Pl. Ex. 26), 221 F. Supp. 968).

At least as early as 1956, leaders of the Jackson Negro community began petitioning the Board of Commissioners to implement this Court's 1954 decision requiring public school desegregation (T. 371-372). They met with total failure for at least five years until the beginning of the 1961-62 school year. Then, pursuant to the Tennessee Pupil Placement Act, the board began accepting individual applications for enrollment of Negro children in white schools. During 1961-62, three Negro students were admitted to white schools under this act, and in the following year (1962-63), four more, for a total of seven (T. 371-372).

In early 1963, this lawsuit was filed. In June, 1963, the district court granted plaintiffs' motion for summary judgment, and ordered the Board of Commissioners to file a plan of desegregation. After proposing a gradual timetable for desegregation grade by grade starting from the lowest grade up, which was modified and then approved by the district court (221 F. Supp. 968), the board began implementation of its alleged plan of desegregation in the elementary schools in 1963.

A new set of zones for the elementary schools was announced which was supposed to be unitary, non-racial, and drawn according to the accepted educational standards of compactness and capacity of buildings. Nevertheless, there were certain departures from these standards. The district court held after the 1965 hearing that racial gerrymandering was so obvious in the case of the boundaries between the white West Jackson and Negro South Jackson Schools, the white Parkview and Negro Washington-Douglass Schools, and the white Alexander and Negro Lincoln Schools that the boundaries had to be re-drawn Appendix, pp. 13b-14b.

Plaintiffs' educational expert Dr. Bardwell testified that in addition to these situations which the district court corrected, the boundaries between other white and Negro zones were drawn to place Negro children living closer to white schools in the Negro zones (T. 152). After inspection of a map of all elementary zones superimposed on a racial residential census of the city, Dr. Bardwell concluded that the zones "follow in many areas the racial complex of the neighborhood, rather than the geography of the situation," and if geography were the main criterion, seven of the eight elementary schools "would be integrated to a much greater degree than they are" (T. 153-155).

Having achieved the maximum possible perpetuation of segregation through school zoning, the defendant school system then adopted a transfer policy to make it possible for students who were unavoidably zoned to a school where their race would be in the minority, to transfer to a school where their race would be in the majority (App. 7b-8b). While the original plan of desegregation approved by the district court in 1963 provided that any transfer policy could be adopted as long as it did not have as its purpose the delay of desegregation, the district court found in 1965 that the school system had administered its ostensibly open transfer policy in the following manner: "They have allowed white pupils as a matter of course to attend schools, outside of their unitary zones, in which white pupils predominate, and have allowed Negro pupils as a matter of course to attend schools, outside of their unitary zones, attended only by Negroes but they have denied Negroes (and specifically intervening plaintiffs) the right to attend predominantly white schools outside of their unitary zones" (T. 346-347, App. 8b). In other words, the Board was using the "minority to majority" transfer policy which had been condemned by this Court in 1963 in *Goss* v. *Board of Education*, 373 U.S. 683 (1963), App. 8b.[3]

After the Board of Commissioners began its plan of ostensible desegregation in 1963, it continued its previous

[3] Other aspects of the system's transfer policy were also administered in accordance with the principle of a segregated dual school system. Plaintiffs' educational expert Mr. Herman testified that the Jackson city school system admitted approximately 400 students from surrounding Madison County (out of approximately 8,000 total students in the city system), and all white students were assigned to schools which were all or predominantly white and all Negro students to schools which were all-Negro, without exception (T. 210-211). Mr. Herman also suggested that county transferees of the same race as the predominant race in any particular school were apparently given priority in assignment over students of a minority race who actually resided in the zone of that school (T. 211).

practice of assigning Negro teachers only to schools whose enrollments had been and remained all-Negro, and white teachers only to the schools which had been previously all-white and remained predominantly white under the desegregation plan in operation (T. 294). As late as the 1964-65 school year, the Board was asserting as the basis of this policy that "the integration of the faculty is not related to nor necessary for the achievement of elimination of compulsory segregation" (53a) and that "the destruction of the entire City School System is seeded in this request [for faculty desegregation] in such fashion as to be beyond the control of defendant officers, not from violence but from student withdrawal" (42a).

The Racial Basis of the Board's Junior High School Attendance Policies and the Educational Expert Panel's Proposed Non-Racial Plan

The district court's approval of the Board of Commissioners' zoning plan for junior high schools, as affirmed by the Court of Appeals, is specifically at issue here. Jackson has three junior high schools: Tigrett, heretofore all-white, is located in the western part of the city; Merry, heretofore and still all-Negro, in the center of the city; and Jackson, heretofore all-white, in the eastern portion (Pl. Ex. 26, App. 14b).

All three junior high schools were constructed in the ten-year period after 1955 during which the Board of Commissioners was operating a segregated school system contrary to this Court's 1954 and 1955 pronouncements in the *Brown* cases (T. 174). The two schools intended for whites were located in the centers of white residential concentration in the western and eastern sections of the city; the single school intended for Negroes was located in the center

of the Negro residential concentration in the central section of the city (T. 201-205).

When the Board of Commissioners was finally forced to announce a plan for the desegregation of the junior high schools in late 1964 under the district court's original 1963 order, it proposed a set of irregularly shaped zones in which the center zone for previously all-Negro Merry Junior High School was shaped roughly like an hour glass (Pl. Ex. 19). In developing these zones, the Superintendent of Schools apparently did not undertake to find out how many junior high school students there were in the city and attempt to match the numbers of students to the capacities of the respective schools, in spite of affirming that he used educational considerations such as capacity of schools in formulating the zones (T. 38-135, 63-65).

After analysis of a racial residential map of the city showing the locations of the residences, and the race, of all students in the school system, plaintiffs' educational expert Merle G. Herman concluded with regard to the junior high school zones: "There seems to be a very distinct tendency for the lines to follow the residences of Negroes and whites —in other words, separating the two. Where there is a large Negro population, there tend to be lines drawn to maintain segregation in the schools that serve those areas" (T. 201).

After the new junior high school zones were announced for the following year in late 1964, and after the school system had discovered from the 1964-65 enrollment figures that all-Negro Merry Junior High School, which then accommodated all Negro junior high school students in the city but one, was three pupils over capacity, the Board of Commissioners decided in the spring of 1965 to construct four additional classrooms at Merry so as to increase its

capacity by 120 (T. 35-36, 99-100). This decision was made despite the facts that (1) *the enrollments of the two previously all-white junior high schools were approximately 300 students under capacity,* and (2) *the elementary school enrollment figures indicated that total junior high enrollment for the system would remain constant at about 100 students above the present enrollment for at least the next four years* (T. 35-36, 215-216).

When asked whether based on his experience no white children could be expected to enroll in Merry Junior High School and would it not therefore remain all-Negro, the Superintendent of Schools said, "Judging on the basis of what has happened up to now, that might be the case. . . . I imagine it will be predominantly Negro" (T. 101-102). He also expected that the small number of Negro students from the other two zones of the heretofore all-white junior high schools would continue coming to Merry, something the Board's transfer policy would encourage (T. 102). The Superintendent attempted to justify the construction of an addition to Merry Junior High by pointing out that all-Negro Merry Senior High School (in the same building), was growing and might need some of the rooms presently used by the junior high school. *But he also admitted that the all-white senior high school (not yet then desegregated) was 249 students under capacity* (T. 103).

In the course of the district court hearing on the proposed junior high zones, plaintiffs' educational expert Mr. Herman explained that the standard basis for drawing junior high school zones was the "feeder" principle. By this, junior high school zones are based on elementary school zones and are composed by clustering several such zones so that all students from the same elementary school go on to attend the same junior high school:

> . . . , the main consideration is to follow ordinarily the elementary school lines so that when elementary schools are then taken and six graders graduating go into junior high schools, then there is an integration of effort between the elementary schools and the junior high schools where orientation procedures might be developed, that is where sixth graders might go into junior high schools and get acquainted with it. The principals are able to work together in enabling a sufficiently easy transition from the elementary to the junior high school. Also from a guidance point of view, it is well that the schools have some associations that are teacher relationships and administrative relationships which should be developed between the feeder schools and the schools into which the children are being enrolled (T. 198-199).

He also explained that geography and compactness were not so important in junior high zoning as in elementary zoning, since junior high students are "old and mature enough to take care of themselves on the streets . . . and, therefore, you don't pay too much attention to the ordinary barriers that you consider at the elementary school level" (T. 199-200). The Superintendent of Schools admitted the desirability of the "feeder" principle in developing junior high school zones (T. 104-105).

When asked whether the Board of Commissioners' junior high school zoning plan violated the "feeder" principle, plaintiffs' educational expert Mr. Herman stated: "Yes, it does, because the lines of the elementary schools are not consistent with the lines which separate the zones of the junior high schools" (T. 203). Mr. Herman concluded that since "it is an accepted fact here, I think, that white children attend white schools and Negro children attend

Negro schools," that even though a completely free transfer system was superimposed on the Board's junior high school zones based on race, "segregation will continue to exist" (T. 206).

As a further check on whether the Board of Commissioners' proposed junior high school zones were drawn with the primary goal of preserving the maximum amount of segregation, rather than according to standard educational practice, plaintiffs' experts undertook to draw junior high school zones for the city of Jackson, as they would for their own school systems. They obtained all of the relevant data necessary for drawing such zones, such as detailed maps of the city, the locations of the elementary and junior high schools, the locations of the residences of all students, the capacities of schools, etc., both from the office of Superintendent of Schools and by utilizing a research assistant at Lane College in Jackson (T. 138-139, 142-145, 171-172, 187-190, 368-370).

The expert panel concluded that by using the accepted "feeder" principle, all of the existing elementary schools in the city were located so that compactly designed zones around them could be conveniently clustered into three zones for the three existing junior high schools in the following manner: (1) Parkview (white), Washington-Douglass (Negro), and Whitehall (white) Elementary School zones would be the zone for Jackson Junior High School; (2) Highland Park (white), West Jackson (white), and South Jackson (Negro) Elementary School zones would be the zone for Tigrett Junior High School; and (3) Alexander (white) and Lincoln (Negro) Elementary School zones would be the zone for Merry Junior High School (T. 209). Each of these elementary schools is located conveniently to its proposed feeder junior high school, and

the capacities of the elementary schools were matched to their respective proposed feeder junior high schools (T. 209). The expert panel assumed that the then existing elementary school zones drawn by the Board of Commissioners would have to be altered to produce greater compactness and reduce racial gerrymandering, as the district court eventually required, in part (T. 208-209, App. 13b). The panel concluded that by drawing the zones in accordance with the "feeder" principle, "the junior high school zones would be developed objectively, without regard to the racial character of the neighborhood" and "from an educational point of view, it would be sound" (T. 209).

The Expert Panel's Analysis of Why the City of Jackson's Schools Will Remain Segregated Unless its Policies are Changed to Disestablish Segregation

All three of plaintiffs' educational experts agreed that the combined effects of the school system's racial zoning policy, segregated faculty assignments, and "minority to majority" and other racially based transfer policies, had preserved almost total segregation, and had in fact fostered segregation after the schools had ostensibly been desegregated. Dr. Roger W. Bardwell pointed out that where the Board had zoned all of the schools in such a way that their enrollments were conspicuously either predominantly white or almost all-Negro, and thus preserved the racial identity of the schools as they were under the dual school system, the availability of the transfer option caused the racial identification of the schools to become even more pronounced by permitting the remaining students of the minority race in each school to transfer out (T. 159-161, 183-184). Dr. Bardwell indicated that where the school system had conferred racial identities on individual schools, it would be expected that substantial numbers of students

would transfer out of those schools because they were of the minority race and this was confirmed by the fact of an abnormally large number of transfers within the system (T. 159-161, 183-184). Merle G. Herman stated that the effect of a transfer system predicated on race superimposed on zones predicated on race would operate "to maintain whatever the attitude structure is of the people who have children in those schools" and where the attitude toward integration was obviously unfavorable because of the large number of minority to majority transfers, "this would totalize segregation" (T. 200-202). Dr. Eugene Weinstein pointed out the cumulative effects of faculty segregation on the racially gerrymandered zoning and minority to majority transfer policies: "First, especially in conjunction with a transfer plan, it tends to continue to stigmatize Negro schools or schools that were formerly Negro schools as Negro, and to make schools which were newly desegregated still be regarded as white schools as part of the generalized conception of the schools themselves" (T. 302). He concluded that "faculty segregation tends to make additional impetus to transfer out of a Negro school. because it is obvious that it is Negro in all of its educational environs and it tends to stigmatize a school as a Negro school" (T. 315). Dr. Bardwell and Mr. Herman both concurred in Dr. Weinstein's conclusion (T. 160, 201).

REASONS FOR GRANTING THE WRIT

I.

Introduction—The Importance of the Case.

This case raises a fundamental issue concerning the implementation by the lower federal courts of this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483; 349 U.S. 294, requiring desegregation of the public schools where there has been compulsory legal segregation. The issue is whether a city school system which utilizes all the discretion available in locating buildings, and determining attendance zoning and student transfer policies, to perpetuate and increase racial segregation in the period following the *Brown* decisions, should be held to have met its obligations to desegregate simply because it has also permitted a small number of Negro students to attend previously all-white schools.

The City of Jackson's combination zoning and transfer plan is one of the two common types of desegregation plans utilized in the South, especially in city school systems. The other is the "freedom of choice" type plan. See petition now pending in *Green* v. *County School Board of New Kent Co., Virginia,* No. 695, October Term 1967. Both types of desegregation plan achieve the common result of keeping previously all-Negro schools all-Negro; the only integration which occurs comes from a small proportion of Negro students attending predominantly white schools.

Although the proportion of Negroes in all-Negro schools has declined since the 1954 decision of this Court in *Brown,* more Negro children are now attending such schools than

in 1954.[4] Indeed, during the 1966-67 school year, a full 12 years after *Brown*, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in schools which were 100% Negro.[5] And, in the case before the Court, over 85% of the Negro pupils in the system still attend schools with only Negroes.[6] Thus, "this June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever attending a single class with a single white student."[7] And, as the Fifth Circuit has had occasion to say, "for all but a handful of Negro members of the High School Class of 1966, this right [to a racially non-discriminatory public school system] has been of such stuff as dreams are made on."[8] It is clear then, that the desegregation process ordered by the first *Brown* decision has met with unforeseen obstacles, and that further consideration of the problem of remedy originally considered in the second *Brown* decision is in order.

The issue of this case of a systematic evasion of the constitutional obligation to desegregate is raised more particularly by a fact situation in which a board of education (1) maintained a completely compulsorily segregated sys-

---

[4] *Southern School Desegregation, 1966-67*, a Report of the U.S. Commission on Civil Rights, July, 1967 at p. 11.

[5] *Id.* at 165.

[6] State of Tennessee, Department of Education, Equal Educational Opportunities Program, *Fall 1966 Desegregation Report on Tennessee's Public Elementary and Secondary Schools* (compiled from reports to the U.S. Office of Education).

[7] *Southern School Desegregation, 1966-67*, at p. 147.

[8] *United States et al.* v. *Jefferson County Board of Education, et al.*, 372 F.2d 836, 845 (5th Cir., 1966) *re-affirmed en banc*, 380 F.2d 385 (5th Cir., 1967).

tem after Brown until this lawsuit was filed in 1963, (2) undertook the constructon of three compulsorily segregated junior high schools during the period after *Brown* which were located in the centers of racially segregated residential concentrations of the city, (3) at the start of the junior high desegregation plan in 1965 zoned those schools in such a way as to follow the patterns of racial residential segregation to the maximum extent possible, (4) provided a transfer provision by which students of the minority race (white or Negro) who were unavoidably zoned to a school in which they would be in a racial minority were encouraged to transfer to a school in which they would be in a racial majority, and (5) upon determining that the single all-Negro junior high school was not of sufficient capacity to accommodate all the Negro junior high students in the city undertook to construct additional capacity at that school while there was still substantial excess capacity at the two all-white junior high schools.

The result has been, and remains that the previously all-Negro junior high school remains an all-Negro junior high school, and that there is a very small proportion of Negro students attending the previously all-white and still overwhelmingly white junior high schools. (The three previously all-Negro elementary schools and the previously all-Negro senior high school—not directly in issue in this petition—also remain all-Negro under the same policies).[9]

There is a natural reluctance on the part of an appellate court to consider the details of administration of a school system and the complexities of desegregation in any particular district. For this reason, perhaps, this Court has considered few school cases since 1954, and those all in one form or another raised the question of the survival of the

---

[9] *Tennessee Fall 1966 Desegregation Report, supra.*

desegregation process itself. Now that the pattern of resistance has shifted decidedly from absolute defiance to evasion, the urgent question is whether a board may adopt a course which perpetuates segregation for the overwhelming majority of Negro students, while paying lip service to the obligation to desegregate. This question of necessity requires consideration of the details of a particular system's operation, for only in this manner can the principle of school desegregation become the practice of disestablishment of segregation.

This case provides an especially appropriate vehicle to consider the general problem of evasion of the obligation to desegregate. The record presents a comprehensive analysis of the issues by a panel of educational administrators who served as expert witnesses. In particular, the panel conducted an extensive survey of the zoning problem in the Jackson school system just as they would have if they were drawing zones for their own systems. They then proceeded to actually design a model zoning plan for the Jackson junior high schools based on standard and accepted educational principles. The fact that this zoning plan would completely integrate the three junior high schools in Jackson is the most convincing possible support for their general conclusion that the zones actually devised by the Jackson school system were designed to preserve the maximum possible degree of segregation rather than according to the asserted non-racial educational considerations.

II.

The Sixth Circuit Applied an Erroneous Standard in Deciding this Case, Which is Inconsistent with Decisions of this Court.

When confronted with the facts of this case of the racially oriented process by which the school board created the junior high zones and the end result of almost completely segregated junior high schools, the Sixth Circuit in its opinion under a heading entitled "Compulsory Integration" stated that petitioners were apparently asking them to require school authorities to take "affirmative" steps to eradicate the existing pattern of racial segregation in the schools. While indicating that they recognized that they were in fact dealing with Tennessee schools which had been legally and compulsorily segregated prior to *Brown* and to which the *Brown* decisions perforce applied, the Sixth Circuit held:

> We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to *Brown*, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation. Appendix, *infra*, p. 35b.

In spite of petitioners claim that the City of Jackson's school system had not yet been desegregated according to the requirements of the first *Brown* decision, and that they were therefore invoking the equitable obligation of the second *Brown* decision to desegregate, the Sixth Circuit suggested that petitioners were really seeking to impose a "Bill of Attainder" (!) on the State of Tennessee:

> To apply a disparate rule because these early systems [segregated systems] are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures and the states of the nation—U.S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Appendix, *infra*, pp. 36b-37b.

By its reference to the fact that biracial school systems "were once found lawful in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and such was the law for 58 years thereafter," Appendix, *infra*, p. 36b, the Sixth Circuit indicated rather clearly that it regards the patterns, practices, and traditions which were evolved by those biracial school systems as still having substantial legitimacy, and, in effect, that *Plessy* v. *Ferguson* remains influential in construing the extent of the obligation to desegregate enunciated by the second *Brown* decision.

The Sixth Circuit held that "We read *Brown* as prohibiting only enforced segregation," and that no relief was justified since it was now theoretically possible for individual Negro students to attend previously all-white schools in Jackson. Appendix, *infra*, p. 35b. It thus re-affirmed its limited view of the constitutional obligation of desegregation earlier enunciated in *Kelley* v. *Board of Education of the City of Nashville, Tenn.*, 270 F.2d 209 (6th Cir., 1959), *cert. den.* 361 U.S. 924 and adhered to consistently since that time:

> It [the Supreme Court] has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools .... The Constitution, in other words, does not require integration. It merely forbids discrimination. 270 F.2d at 226.

Based on this view, the Sixth Circuit had held in *Kelley* that a "minority to majority" transfer policy which permitted any child zoned to a school in which his race was in the minority to obtain a transfer to a school in which his race was in the majority, was not in violation of the Fourteenth Amendment since "there is no evidene before us that the transfer plan is an evasive scheme for segregation." 270 F.2d at 229. But see *Goss* v. *Board of Education of the City of Knoxville, Tenn.*, 373 U.S. 683 (1963) which repudiated *Kelley* and, we submit, the legal philosophy on which it rested—which persists in this case. See also *Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 373 F.2d 75 (6th Cir. 1967).

There is nothing in this Court's decisions on school desegregation which supports the Sixth Circuit's view on the facts of this case that the constitutional obligation of the Fourteenth Amendment is satisfied by allowing a few Negro students to attend formerly all-white schools, while all of the building location, zoning, and transfer policies of the school system are manipulated in such a way as to keep as many Negro students as possible in all-Negro schools. There is also nothing in this Court's decisions on school desegregation which supports the Sixth Circuit's view of the legal standard set by the second *Brown* decision as involving no affirmative obligation to re-organize the biracial school system to eliminate the practice of segregation.

This Court held from the beginning that the constitutional ban on segregation in public education required far reaching affirmative action in completely re-organizing the entire school system to eliminate the practice. In the second *Brown* decision, 349 U.S. 294 (1955), it said:

> At stake is the personal interest of plaintiffs in admission to public schools as soon as practicable on a

> nondiseriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. 349 U.S. at 300.

This Court indicated the nature of the obstacles to be overcome in the second *Brown* decision by its direction to the courts supervising the re-organization of the school systems to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300-301. This direction, combined with the "deliberate speed" proviso, indicates that a thorough and complete re-organization of the segregated school systems was envisioned.

In *Cooper* v. *Aaron*, 358 U.S. 1 (1958), this Court stated that the *Brown* decisions imposed an affirmative obligation on school officials of segregated dual school systems to disestablish segregation:

> State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system. 358 U.S. at 7.

Although *Cooper* itself was a case of clear and direct defiance by state officials, this Court looked forward to a time when attempts to perpetuate segregation in public education might become more subtle, when it said that the constitutional rights involved "can neither be nullified

openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" 358 U.S. at 17.

Recently, in *Rogers* v. *Paul*, 382 U.S. 198 (1965), this Court re-affirmed the completeness of the reorganization of the segregated school systems suggested by the enumeration of factors in the second *Brown* decision. It indicated that the provision of transfers for Negro students who so desired to schools with more extensive curricula from which they had been excluded, was something substantially less than it envisioned as an adequate general plan of desegregation.

In the second *Brown* decision, this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." 349 U.S. at 300. The general equity principle is that there is no wrong without a remedy, and therefore equity courts have broad power to provide relief and are obligated to do so. The test of the propriety of measures adopted by such courts is whether the required remedial action reasonably tends to dissipate the effects of the the condemned actions and to prevent their continuance. *Louisiana* v. *United States*, 380 U.S. 145 (1965). An example of the application of this equitable principle is in the antitrust area, where it has been held to require the complete dissolution of large national business enterprises, when there was no other way to counteract the previous effects of illegal monopolization. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1943); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Similarly, it has been held to require that fed-

eral courts conduct the redrawing of state legislative districts when there was no other way to counteract the effects of population disparities in existing state legislative districts. *Reynolds* v. *Sims*, 377 U.S. 533 (1964). The Sixth Circuit has clearly not recognized its obligations as a court of equity in supervising the district courts as directed by *Brown II* to fashion a complete remedy for the unconstitutional operation of a compulsory segregated school system, since by no conceivable standard can the effects of the condemned action of establishing a pattern and practice of segregation be said to have been rooted out from the Jackson city school system.

III.

The Sixth Circuit's Decision Conflicts with Recent Major Decisions of the Fifth, Eighth, and Tenth Circuits on the Question of Whether a Previously Segregated School System Must Undertake Affirmative Action to Disestablish Segregation.

While it may be contended that school desegregation cases are all unique because they involve the issue of the extent of equitable relief justified by the facts of the particular case, nevertheless there are general similarities. The Sixth Circuit recognized this and expressly stated that its view was in conflict with the rule recently expressed by the Fifth Circuit on the issue of the extent of the obligation of a previously legally segregated school system to act affirmatively to disestablish that segregation:

> We are asked to follow *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir., 1966), which seems to hold that pre-*Brown biracial* states must obey a different rule than those which desegregated earlier or never did segregate. This de-

> cision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished *Bell* v. *School City of Gary, Indiana*, 324 F.2d 209 (7th Cir., 1963), *cert. den.*, 377 U.S. 924, on the ground that no pre-*Brown* de jure segregation had existed in the City of Gary, Indiana. . . .
>
> . . . to the extent that *United States* v. *Jefferson County Board of Education*, and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in *Deal*, we respectfully decline to follow them. Appendix, *infra*, pp. 36b-37b.

The Fifth Circuit holds contrary to the Sixth Circuit that affirmative action—such as the rezoning plan offered by petitioners' experts here—must be taken to break up the pattern and practice of segregation which had previously been established: "The two *Brown* decisions . . . compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, nonracial system." 372 F.2d at 847. The Court wrote:

> If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. 372 F.2d at 895-6.

With reference to the Sixth Circuit's view that the legal standard for the extent of the obligation to desegregate is that the Constitution does not require integration, but

merely forbids compulsory segregation, the Fifth Circuit says that "what is wrong about [this view] is that it drains out of *Brown* that decision's signfiicance as a class action to secure equal educational opportunities for Negroes by compelling the states to reorganize their public school systems." 372 F.2d at 865. The court said:

> Segregation is a group phenomenon. . . . Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and the organized undoing of the effects of past segregation. 372 F.2d at 866.

The Fifth Circuit contradicts the Sixth Circuit's view that segregation in the South is now just like segregation in the rest of the country:

> . . . the holding in *Brown*, unlike the holding in *Bell* but like the holdings in this circuit, occurred within the context of state-coerced segregation. The similarity of pseudo de facto segregation in the South to actual de facto segregation in the North is more apparent than real. Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together. In this circuit, therefore, the location of Negro schools with Negro faculties in Negro neighborhoods and white schools in white neighborhoods cannot be described as an unfortunate fortuity: It came into existence as state action and continues to exist as racial gerrymandering, made possible by the dual system. 372 F.2d at 876.

• • •

> The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to the Negro school in his zone. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes. It requires conversion of the dual zones into a single system. Faculties, facilities, and activities as well as student bodies must be integrated. 372 F.2d at 867-868.

Moreover, the Sixth Circuit's decision necessarily conflicts with the recent decision of the Court of Appeals for the Eighth Circuit in *Kelley* v. *The Altheimer, Arkansas Public School District No. 22,* 378 F.2d 483 (8th Cir., 1967), which specifically rejected the interpretation of the Fourteenth Amendment adhered to by the Sixth Circuit that "the Constitution, in other words, does not require integration. It merely forbids discrimination." 378 F.2d 488. The Eighth Circuit held that there is an affirmative obligation to disestablish segregation:

> We have made it clear that a Board of Education does not satisfy its constitutional obligation to desegregate by simply opening the doors of a formerly all-white school to Negroes. 378 F.2d at 488.

It added that this meant that the board of education must take affirmative steps to change the identities of all-Negro schools into integrated schools, as well as allowing individual Negro students to transfer to formerly all-white schools:

> The appellee School District will not be fully desegregated nor the appellants assured of their rights under the Constitution so long as the Martin School clearly remains identifiable as a Negro school. The requirements of the Fourteenth Amendment are not satisfied by having one segregated and one desegregated school in a District. We are aware that it will be difficult to desegregate the Martin School. However, while the difficulties are perhaps largely traditional in nature, the Board of Education has taken no steps since *Brown* to attempt to change its identity from a racial to a non-racial school 378 F.2d at 490.[10]

Finally, the Sixth Circuit's decision conflicts squarely with that of the Tenth Circuit in *Board of Education of Oklahoma City Public Schools* v. *Dowell et al.*, 375 F.2d 158 (10th Cir., 1967), *cert. den.* 387 U.S. 931. The factual pattern of this City of Jackson case is virtually identical to that with which the Tenth Circuit was confronted in the Oklahoma City case. The one difference was that the Oklahoma City public schools were somewhat further along

---

[10] A subsequent decision of the Court of Appeals for the Eighth Circuit, *Raney et al.* v. *The Board of Education of the Gould School District*, 8th Cir., No. 18,527, August 9, 1967, appears to conflict with *Kelley* v. *Altheimer* since the facts of the two cases were very similar. However, there was little discussion of general legal principles of school desegregation in *Raney*, since the Court held that a general attack on the adequacy of the desegregation plan had not been properly made in the district court. *Raney* also seemed to leave open the possibility of eventually requiring a complete re-organization of the school system to disestablish segregation, but at some indefinite time in the future.

in the desegregation process than the City of Jackson. The Oklahoma City school system had announced a formal desegregation plan in 1955, whereas the City of Jackson schools did not take even this initial step until 1961. After zoning its schools in such a way as to preserve the maximum possible segregation without explicit dual zones through following the patterns of racial residential segregation, the Oklahoma City school system then instituted a "minority to majority" transfer plan by which students who were unavoidably zoned to schools where they would be in a racial minority were encouraged to transfer to schools where they would be in a racial majority. Thus, virtually all of the schools in Oklahoma City which had been designated as "white" or "Negro" schools under segregation, remained identified as "white" or "Negro" schools because the student bodies were almost or entirely all-white or all-Negro. The City of Jackson school system did likewise. The Oklahoma City school system continued to assign all-Negro faculties to schools which were all or predominantly Negro in student body, and all-white faculties to schools which were all or predominantly white in student body, thereby reinforcing the identifications of various schools as being intended for Negroes or whites rather than just for students. The City of Jackson school system acted similarly. The Oklahoma City school system located new schools constructed after 1955 in the centers of homogeneous racial residential concentrations, so as to facilitate the perpetuation of segregation through the use of zoning, transfer, and faculty assignment policies. The City of Jackson school system did the same. At the time of the final district court order of relief in the Oklahoma City case in 1965, about 80% of the Negro students in the system still attended schools which were all-Negro or over ninety-five percent Negro in student body. During the last school year (1966-67) in the City of Jackson, over 85% of the Negro

students in the system still attended schools which were one-hundred percent Negro in student body.[11]

Based on these facts, the Tenth Circuit in the *Oklahoma City* case approved a district court finding that "the school children and personnel have in the main from all of the evidence been completely segregated as much as possible under the circumstances rather than integrated as much as possible." 375 F.2d at 161, fn. 2. The Tenth Circuit stated that "inherent in all of the points raised and argued here by [the school board] is the contention that at the time of the filing of this case [1961] there was no racial discrimination in the operation of the school system." 375 F.2d at 164. It responded that this fact situation did constitute a case of legal segregation which had not been disestablished, in spite of the facts that zone lines had been redrawn to eliminate obvious duality in 1955, and that there were some Negro students attending previously all-white schools:

> As we have pointed out, complete and compelled segregation and racial discrimination existed in the Oklahoma City School system at the time the Brown decision became the law of the land. It then became the duty of every school board and school official "to make a prompt and reasonable start toward full compliance" with the first Brown case. It is true the board, in 1955, issued the policy statement and implemented it by the drawing of school attendance lines and inaugurated a "minority to majority" pupil transfer plan. The attendance line boundaries, as pointed out by the trial judge, had the effect in some instances of locking the Negro pupils into totally segregated schools. In other attendance districts which were not totally segregated the operation of the transfer plan naturally

[11] *Tennessee Fall 1966 Desegregation Report, supra.*

led to a higher percentage of segregation in those schools. 375 F.2d at 165.

The Tenth Circuit then held in *Oklahoma City* that "under the factual situation here we have no hesitancy in sustaining the trial court's authority to compel the board to take specific action in compliance with the decree of the court so long as such compelled action can be said to be necessary for the elimination of the unconstitutional evils pointed out in the court's decree." 375 F.2d at 166. Included in the action required to eliminate the effects of previous unconstitutional segregation was an order pairing six-year secondary schools so that three grades of each school were consolidated in one school and three grades in the other school, thereby completely integrating each school in the pair. This clearly required a school board to take affirmative action to disestablish the pattern and practice of segregation preserved through the use of a zoning plan; it necessarily is in conflict with the Sixth Circuit's decision in this City of Jackson case which labels such affirmative action as "compulsory integration" and a "judicial Bill of Attainder." Judge Lewis concurring in the *Oklahoma City* case explained the Tenth Circuit's view that since compulsion was used to maintain the system of segregation, the compulsion inherent in school assignment policies may properly be used to disestablish segregation:

> I have no quarrel with the statement that forced integration when viewed as an end in itself is not a compulsion of the Fourteenth Amendment. But any claimed right to disassociation in the public schools must fail and fall. If desegregation of the races is to be accomplished in the public schools, forced association must result, not as the end sought but as the path to elimination of discrimination. And, to me,

the argument that racial discrimination cannot be eliminated through factors of judicial consideration that are based upon race itself is completely self-denying. The problem arose through consideration of race; it may now be approached through similar but enlightened consideration.

The correctness of the Sixth Circuit's differing standard for reviewing desegregation plans merits the attention of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL J. HENRY
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee

J. EMMETT BALLARD
116 W. Lafayette St.
Jackson, Tennessee

Attorneys for Petitioners

APPENDIX